

8 August 2021

National Indigenous Australians Agency
Canberra ACT 2600

*spirit
of
Change*

ABN 32 122 833 158

12-14 Leveson Street
North Melbourne, 3051
PO Box 585
Cannington WA 6987

Tel: +613 9326 7822
Fax: +613 9326 4075

Via email: CATSIActReview@niaa.gov.au

Dear CATSI Act Review Team,

NNTC Submission on the Exposure Draft of the Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021

The National Native Title Council (NNTC) welcomes this opportunity to comment on the exposure draft of the *Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021* (Amendment Bill).

The NNTC makes this submission in its capacity as the peak body for Australia's Native Title Organisations representing Native Title Representative Bodies and Service Providers (NTRB/SPs) and Registered Native Title Prescribed Bodies Corporate (RNTBCs) recognised under the *Native Title Act* (NTA) and other comparable legal entities such as Traditional Owner Corporations recognised under the Victorian *Traditional Owner Settlement Act*. The NNTC wishes to note that the comments contained in this submission do not preclude any views or opinions put forward by individual NTRB/SPs or PBCs.

This submission focuses primarily on those aspects of the Bill most relevant to Registered Native Title Bodies Corporate (RNTBCs) and the NNTC's members and the Traditional Owners and native title holders they represent.

1. Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*

- 1.1. The current comprehensive review of the *Corporations (Aboriginal and Torres Strait Islander) Act* (CATSI Act) being undertaken by the NIAA was announced by the Minister for Indigenous Australians, the Hon Ken Wyatt in December 2019. It is the first comprehensive review since the CATSI Act commenced in 2007.

- 1.2. The preamble to the CATSI Act acknowledges that the legislation is intended to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the *Racial Discrimination Act 1975* (RDA).
- 1.3. To satisfy the definition of a special measure it is necessary for a measure to facilitate the advancement of the relevant disadvantaged group. This requires that the CATSI Act and any amendments to it must be able to be legitimately characterised as special measures to facilitate the advancement of Aboriginal peoples and Torres Strait Islanders.

2. CATSI Act Review Draft Report and Final Report

- 2.1. In response to the CATSI Act Draft Review Report of 31 July 2020 (Draft Report) the NNTC consulted its members and lodged a detailed submission addressing the proposals and questions raised in the Draft Report. In that submission the NNTC indicated that it supported a significant number of the proposals in the Draft Report while also having concerns about a number of others.
- 2.2. At the same time the NNTC noted the importance of striking an appropriate balance between an educative/capacity building approach and a prescriptive and more detailed regulatory approach to achieve transparency, accountability and good corporate governance under the CATSI Act.
- 2.3. In relation to benefit management structures the NNTC emphasised the need to develop better and less complex options for RNTBCs, noting that this will be even more important when native title groups begin to secure significant benefits through compensation claims and settlements. In its submission the NNTC also outlined the potential benefits of developing a PBC Economic Vehicle Status model as an option for RNTBCs and provided detail on this model in an appendix.
- 2.4. One of the most significant recommendations made in the NNTC's submission on behalf of its members was that a separate Chapter or Division should be created within the CATSI Act to bring together all the provisions relevant to RNTBCs in a coherent manner. This Chapter or Division could also be developed further to include any new provisions that may be required over time for the more effective governance of the growing number of RNTBCs and, if required, the management of native title benefits.
- 2.5. The NNTC notes that the CATSI Act Review Final Report dated 30 October 2020 (Final Report) made 72 recommendations and supported the creation of a separate division dedicated to those provisions in the CATSI Act specific to RNTBCs.
- 2.6. The Guide to the Exposure Draft of the CATSI Amendment Bill (Guide) notes that most of the 72 recommendations are being implemented by the Amendment Bill. Only eight are not being implemented.

3. A Separate Chapter/Division for RNTBCs

- 3.1. Recommendation 62 in the Final Report proposed a separate division of the CATSI Act dedicated to those provisions specific to RNTBCs. It is of great concern to the NNTC and its members that a decision appears to have been made not to implement this recommendation.
- 3.2. The Guide explains the reason this recommendation is not being taken forward is that RNTBCs are subject to the general provisions of the CATSI Act and there are few specific stand-alone RNTBC provisions, and that “additional guidance that provides a holistic overview of the legislative requirements for RNTBCs is expected to be more useful than a stand-alone chapter in the CATSI Act.”.
- 3.3. The NNTC considers that this reasoning demonstrates a fundamental failure to understand the unique nature and status of RNTBCs and the complex cultural, social, economic and regulatory environment in which RNTBCs operate when compared to other CATSI Act corporations.
- 3.4. As the NNTC explained in its response to the draft review report, the native title rights and interests recognised by the Federal Court are sui generis and this is acknowledged in the NTA and in the judgments of the Federal and High Courts.
- 3.5. A native title determination recognises the particular traditional rights and interests of native title holders within their societies. These rights and interests run with the land and waters forever and are recognised by the Courts as being good against the whole world.
- 3.6. Where the Federal Court has determined that native title exists, the common law holders of that native title are compelled to incorporate under the CATSI Act through the operation of specific provisions in the NTA and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (PBC Regulations).
- 3.7. The Law Council of Australia has noted that ironically the effect of this is that common law holders, who have finally had their continuing traditional rights and interests recognised by the Australian legal system, are required to accept that they must adopt a non-indigenous corporate structure to manage their traditional rights and interests.
- 3.8. But unlike other corporations whose directors and members duties and obligations are primarily governed by the CATSI Act and the general law, an RNTBC and its directors and members also have duties and obligations to non-member native title holders who are part of their society recognised by the Federal Court.
- 3.9. Furthermore, the duties, obligations, activities and relationships of an RNTBC, its directors and members, are also governed by the traditional laws and customs of the society of which they are part and are overlaid with the extensive requirements of the NTA and the detailed provisions of the PBC Regulations.

- 3.10. These are not CATSI Act corporations that are merely subject to the general provisions of the CATSI Act as suggested by the NIAA in its rationale for not implementing this recommendation.
- 3.11. As the NNTC has emphasised in previous submissions, for the CATSI Act to justify its continuing existence as a special measure that is consistent with ICERD and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) it must advance the interests of Traditional Owners/native title holders, and it can do this most effectively by supporting the effective governance and operation of their relevant representative institutions which are their RNTBCs.
- 3.12. Creating a Chapter or Division for RNTBCs that brings together the provisions directly relevant to them would be effective in benefiting directors, members and common law holders. It would enhance the governance and operation of RNTBCs, streamline their management and regulation, and support future policy reform processes and legislative developments related to RNTBCs.
- 3.13. The NNTC urges the NIAA to give further serious consideration to implementing recommendation 62 to create a separate Chapter or Division for RNTBCs.

4. Other Feedback regarding the Amendment Bill

At the present time the NNTC considers it appropriate that the CATSI Act is retained as a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders. The NNTC notes the importance of implementing the recommendation that the CATSI Act be reviewed regularly to assess if it is still appropriate to retain as a special measure and supports the proposed amendment that requires a review of the CATSI Act every seven years.

In addition, the NNTC and its members are generally supportive of measures included in the Amendment Bill that provide additional options for CATSI Act corporations and greater flexibility in the way they are able to operate.

However, the NNTC's members have raised concerns about a number of the recommendations or the manner in which they will be implemented by the Amendment Bill. These concerns include:

4.1 Other contact details (Rec 12)

The NNTC supports recording other contact details where these are available to facilitate communication with members. Nonetheless, the NNTC believes that personal information that is contained in the register of members must remain confidential and supports the new s180-26 that enables members to request the redaction of information from the register of members.

The NNTC notes that keeping these details up to date may be unduly onerous for a corporation where members and directors regularly move between communities or addresses or live in circumstances where there is a high turnover of mobile phones and phone numbers.

It is concerning that if a corporation has entered 'other contact details' in its register for a director and does not notify the Registrar within 28 days of a change in a director's 'other contact details' (including, presumably, new telephone numbers, email addresses, or social media contact details) it will commit an offence of strict liability. The NNTC does not believe the offence provision in s304-5(5) should apply to a failure to update these 'other contact details'.

4.2 Decision on application for membership within 6 months (Rec 15)

The NNTC continues to have concerns about the imposition of a statutory 6 month timeframe for directors to make a decision about an application for membership. While this may be a reasonable expectation for some corporations, it may be an unreasonable requirement for corporations that have no resources and are not being actively managed or able to hold regular meetings of directors.

Furthermore, where the eligibility of an application depends on consideration of information that is held by an external organisation or receipt of expert advice there may be delays that are beyond the control of the directors.

The NNTC considers that in circumstances such as these it would be appropriate for the Registrar to exempt corporations from this requirement or exercise the discretion contained in the proposed s144-12 to extend the period in which the directors must make a decision about an application for membership.

4.3 Replaceable rules (Rec 30)

The Final Report recommended that all replaceable rules should be included in a corporation's rule book. This recommendation is now being implemented in a different way, and the proposed s66-1(4A) will require that a "corporation's constitution must identify the replaceable rules (if any) that apply to the corporation".

This provision requires clarification, as it is not clear what it means or what a corporation must do to comply with it. The NNTC considers that the original recommendation to include all replaceable rules in the rule book may be preferable.

The NNTC notes that neither the Final Report recommendation nor the Amendment Bill includes any reference to the transitional provisions that will be necessary to facilitate the implementation of this recommendation.

The NNTC has submitted in the past that making significant amendments to rule books may impose a significant burden on corporations, NTRB/SPs and the Office of the Registrar of Indigenous Corporations (ORIC). It is likely that many corporations will require legal advice and assistance to identify the replaceable rules that apply to them and for this reason the NNTC considers that a significant transition period may be required.

4.4 Altering place, date or time of a general meeting in certain circumstances (Rec 25)

The NNTC supports a corporation being able to issue a new notice of general meeting that changes the date, place or time if the ability to hold the meeting is affected by a death in a community, a cultural activity, or a natural disaster, as proposed in s201-37.

A number of NNTC members consider that in these circumstances the proposed 30 day time limit within which a new meeting must be called is too restrictive, particularly for corporations whose members are widely dispersed or live in remote locations, and a 60 day time limit may be more appropriate.

4.5 Replaceable rule to enable directors to cancel a general meeting (Rec 26)

The NNTC notes that proposed s201-38 will operate as a replaceable rule to enable the directors of a corporation to cancel a general meeting. The NNTC considers that this rule could be improved by qualifying this power by requiring it to be exercised on reasonable grounds.

The NNTC notes that at first glance it is unclear how this provision would operate in relation to a meeting that the directors are calling within the 21 days required after a written request by members to hold a general meeting, as provided for in s201-5 and s201-15. Whether s201-38 will enable the directors to cancel such a meeting and not hold it within 21 days should be clarified.

4.6 Automatic extension of time for holding AGMs and lodging reports (Recs 23 & 28)

The NNTC supports the automatic extension of time for holding an AGM or lodging reports where a corporation's ability to do this is affected by matters such as a death in the community, cultural activity or natural disaster, as provided for in proposed sections 201-153, 330-15, 348-3 and 348-10.

As noted above in relation to an extension of time for calling a general meeting, a number of NNTC members consider that in these circumstances the proposed automatic 30 day extension for holding an AGM or lodging reports may be too restrictive for some corporations that have been affected by one of the matters listed in s348, and a 60 day extension may be more appropriate.

4.7 Reporting of the remuneration of key management personnel and sitting fees paid to directors (Recs 33 & 36)

The NNTC supports measures that improve corporate transparency and accountability for RNTBCs to members and common law holders. However, any public reporting of the remuneration of key management personnel and sitting fees paid to directors should be no greater than that required for comparable companies under the *Corporations Act* and should not be equated with the disclosure requirements imposed by the *Corporations Act* on listed companies.

Similarly, the NNTC considers that any amendments to the *Corporations (Aboriginal and Torres Strait Islander) Regulations* to give effect to new financial reporting requirements should not result in greater public disclosure than required for comparable companies under the *Corporations Act*.

4.8 Independent directors (Rec 40)

The NNTC notes that the proposed replaceable rule in s246-17 that would enable the directors to appoint a person as a director who is not a native title holder without first obtaining the consent of native title holders sits uncomfortably with the original intention of the NTA and the PBC Regulations that only native title holders can be members of an RNTBC.

Nonetheless, it is understood that in some circumstances having this option in the CATSI Act as a replaceable rule may enable a corporation to better protect and advance the interests of native title holders in circumstances they have not anticipated and where they have not made provision for it in their rule book.

The NNTC considers that if this amendment were to proceed it is essential that RNTBCs and their members and common law holders are fully informed about its implications and provide their informed consent as to whether they want this replaceable rule to apply or whether they want to amend or exclude its operation in their rule book.

4.9 Funding and resources for ORIC

A number of NNTC members have emphasized that to improve the transparency, accountability and good corporate governance of CATSI corporations, ORIC should be in a position to provide a greater level of education and capacity building for corporations in addition to its compliance functions.

It is the NNTC's experience that if additional information, educational materials and support could be provided to RNTBCs and their directors, members and common law holders, it would increase transparency and accountability for native title holders in many parts of the country.

While ORIC has carried out these activities as part of its functions since the commencement of the CATSI Act, the proposed amendments to the CATSI Act will create a more complex regulatory environment in which ORIC will have a more active role in overseeing the activities of RNTBCs and a greater number of subsidiaries and joint ventures that will be established under the CATSI Act rather than under the *Corporations Act*.

The NNTC notes that the number of RNTBCs will continue to increase, and that significant compensation claims, and agreements will be finalised in the coming years. In these circumstances the NNTC believes that consideration should be given to whether additional funding and resources will be required so that ORIC can provide a greater level of assistance to RNTBCs and other corporations to support higher standards of effective governance in this more complex and challenging environment.

I trust these comments will be of assistance. However, should you require any further information or have any queries please do not hesitate to contact the NNTC's Director of Legal Policy, Austin Sweeney, on austin.sweeney@nntc.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J. Lowe', is written over a light grey rectangular background.

Jamie Lowe
Chief Executive Officer